

The Honorable Paula L. McCandlis

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

KALEB COLE,

Defendant.

No. CR20-032 JCC

DEFENDANT’S REPLY TO
GOVERNMENT’S RESPONSE TO
MOTION TO REOPEN DETENTION
HEARING AND FOR RELEASE

I. Introduction

Likely recognizing that a clear look at this case reveals simply a young man with no criminal history and no history of violent acts who is accused of making at most implicit threats, in a situation where the government has access to insider communication that reveals that the defendants were not in fact planning any actual violence, and that based on these circumstances the government cannot meet its burden of overcoming the presumption of release, the government doubles down on its strategy of attempting to show guilt by association, appealing to negative pre-associations, and drawing unwarranted conclusions related to Mr. Cole’s alleged possession of firearms. The defense asks the Court to refrain from basing its decision on these considerations, evaluate the case in a manner free from bias, and issue an order releasing Mr. Cole on conditions sufficient to ensure his appearance and protect the community, as warranted by the relevant facts.

1 This memorandum will address a number of points raised in the government's response
2 to the initial motion. See Dkt. No. 65 ("Response").

3 **II. The Court should not credit the government's continued reliance on facts**
4 **unrelated to Mr. Cole and on Mr. Cole's alleged engagement in**
5 **constitutionally protected activity.**

6 The government's response reiterates many of the facts alleged in the complaint which
7 should bear little relevance on the issues related to the question of Mr. Cole's detention in this
8 matter, as they are inadequately supported or do not pertain to him. The government describes
9 Mr. Cole as a leader of Atomwaffen Division (AWD) but does not indicate what it means to be a
10 leader, or even a member, of this organization, whether there is some formal structure for the
11 organization, or how members of this organization communicate with each other. It seems clear
12 that the government is suggesting that Mr. Cole is dangerous simply because he is a member of
13 this group, but provides no information about whether, or how, individual members of this group
14 interact or act in concert. Similarly, the government describes actions taken by other members of
15 AWD as a group or on their own (e.g. the murders allegedly committed by D.A. or the possession
16 of bomb-making equipment by B.R.) as part of Mr. Cole's background, without suggesting, let
17 alone providing evidence, that Mr. Cole was personally involved or even aware of these actions.
18 Without any evidence of such personal knowledge, or of facts suggesting that Mr. Cole may have
19 been some part of any of this, all of this information is simply irrelevant and unfairly prejudicial
20 and should not form any part of a basis to detain Mr. Cole.

21 Likewise, the government continues to propound Mr. Cole's alleged association with
22 highly unpopular ideologies and beliefs, and constitutionally protected activity related to such
23 association, as part of a basis to detain Mr. Cole. The Court should not credit these attempts to
24 appeal to negative pre-associations. The government has submitted a number of alleged photos
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1 of Mr. Cole including: posing in front of Auschwitz, dressed in Ku Klux Klan regalia, and posing
2 with people giving “Heil Hitler” hand signals. Such images are associated with the kind of racism
3 and white supremacy that most people (presumably including the Court) find abhorrent.
4 However, holding or advocating those kinds of beliefs unquestionably comprises constitutionally
5 protected activity, and as such these are not the kind of facts that can support holding someone in
6 jail. See R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 385 (1992). Production of the messaging
7 videos the government has submitted as Exhibits A and B likewise falls within the protections of
8 the First Amendment. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

9 **III. Mr. Cole’s alleged possession of firearms does not support his detention.**

10 The Government in its response to the instant motion, as in the Complaint, takes great
11 issue with Mr. Cole’s alleged possession of firearms and the circumstances surrounding such
12 possession. However, the government notably does not:

- 13 1. Counter in any way the assertion by the defense that the Extreme Risk Protection Order
14 (ERPO) issued against Mr. Cole was not based on even a single violent act committed,
15 or threat made, by Mr. Cole;
 - 16 2. Counter in any way the assertion by the defense that even if Mr. Cole possessed a firearm
17 in Texas after the ERPO issued it did not constitute a violation of the ERPO because
18 Washington state criminal jurisdiction over such allegations does not extend to Texas;
 - 19 3. Assert that Mr. Cole has ever violated any law related to his ability to possess firearms
20 or that he possessed illegal firearms or firearm components; or
 - 21 4. Assert that Mr. Cole ever used a firearm in a dangerous or illegal manner.
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At base, when viewing particularized facts about Mr. Cole, there is no basis to conclude that he presents a danger vis-à-vis firearms, especially not if he were released on federal supervision to his father's home during the pendency of this case and electronically monitored.

IV. The nature of the offense in this matter does not support Mr. Cole's detention.

If the Court looks past the prejudicial and inflammatory information provided by the government, and focuses on the actual allegations, it should become clear that the alleged criminal behavior in this case does not support detention.

The government has charged offenses under two statutes, 18 U.S.C. § 876(c) (mailing threatening communications), and 18 U.S.C. §371 (conspiracy). Each of these crimes carries a 5-year statutory maximum sentence. 18 U.S.C. § 876(c); 18 U.S.C. §371. All of the charges in the indictment pertain to alleged threats rather than alleged violent actions. Dkt. # 16. As described in the complaint, the alleged threats consist of messages stating that the senders know where the recipients live and are watching the recipients, that the recipients should not f*** with the senders, and that the recipients' "actions have consequences." Such statements at most consist of implicit threats. As noted in the initial motion, whether these statements rise to the level of "true threats" (i.e. statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, see Virginia v. Black, 538 U.S. 343, 359 (2003)) is a question which will ultimately be determined by the finder of fact. In any event, however, crimes of this seriousness level are typically not of the sort that would warrant pretrial detention.

The government has not alleged offenses involving violent action nor has it alleged facts that would support such charges. And, crucially, it is not the case that the Court must simply speculate as to whether the alleged participants in the offense may have actually intended violent actions in conjunction with this offense or in the future. The reason for this is that the government

1 had covert sources interacting and communicating with the defendants in this case during the
2 entire period the defendants were allegedly devising and discussing the plan.¹ Indeed, these
3 communications are the basis for the government's case. None of the many recorded
4 communications in this matter suggest that Mr. Cole, or any other defendant, intended actual
5 violence. And because the defendants were unaware of the presence of covert sources during
6 these communications they would have had no reason to refrain from discussion of any other
7 more dire plans. As such, the Court need not speculate about whether the defendants had true
8 intentions for any sort of actual violence. Instead, the communications reveal, if anything, an
9 attempt to limit any perceived threatening component to the messages being planned. See
10 Complaint, Dkt. #1 at 15 (alleging that one of Mr. Cole's co-defendants, during a private online
11 chat, stated that: "COLE 'is developing a number of posters that are threatening but not
12 explicitly'").

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14 This is a case involving allegations of implicit threats made by someone without any
15 criminal record, history of violence, or plan to engage in violence. Such circumstances warrant
16 release.

17 **V. Conclusion**

18 Based on the foregoing, and the arguments previously asserted, the Court should order
19 Mr. Cole's release pursuant to 18 U.S.C. 3142(c) on appropriate conditions.

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¹ This, of course, assumes the authenticity of the government's evidence.

1 Respectfully submitted this 29th day of May, 2020.

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3
4 s/ Christopher Black

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